72-1665

JUN 28 1973

IN THE

Supreme Court of the United States

..... Term, ...

No. 72-1665

MARGARET JENKINS,
Petitioner,

v.

UNITED STATES POST OFFICE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Margaret Jenkins petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 15, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at .... F.2d .... (1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 15, 1973. Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the firing of a probationary postal employee, without opportunity for a hearing, on a disputed charge that while off the job she had used loud and profane language in a department store, a deprivation of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

Margaret Jenkins became a probationary employee of the United States Post Office in Seattle, Washington on August 9, 1969. She worked for the Post Office for five months without incident and performed the duties assigned to her in a competent and unobjectionable manner. (R. 12)

When she arrived at work on January 13, 1970, petitioner was given a letter from the Postmaster of Seattle terminating her employment effective that day. It charged that she had "engaged in an argument" and "used loud and profane language" at a Sears Roebuck and Company store while off the job on January 8, 1970. It went on to state that there "is no allowable appeal from this decision through the Post Office Department procedures" and no appeal to the Civil Service Commission except on grounds of discrimination based on sex, marital status, physical handicap or politics. (The letter, which appears in the record at page 15, is reproduced in [the appendix] to this petition at page A-4.)

Petitioner denied the charges contained in the Postmaster's letter and made requests of both the Post Office and the Civil Service Commission for an opportunity to be heard in regard to the charges made and the adverse action taken against her. (R. 13, 42) Her requests were denied on the ground that she had no right to a hearing under applicable statutes and regulations.[1] (R. 50)

Because of the nature of the charges made in connection with her termination, because of the government's communication of these charges to prospective employers and because petitioner was herself obliged, in the course of seeking other employment, to disclose the history of her employment with the Post Office, petitioner was unable to obtain regular employment after her termination in January of 1970. She had been unemployed for more than two years when the district court dismissed her complaint in May of 1972. (R. 13)

After exhausting all administrative remedies[2] petitioner brought this action in the United States District Court for the Western District of Washington against the United States Post Office, the Postmaster General of the United States, the Postmaster of Seattle, Washington, the Civil Service Commission and its Commissioners, and the United States of America, for reinstatement and back pay under 5 U.S.C. §§702-704 (1966) (Administrative Procedure Act), 28 U.S.C. §1346(a)(2) (1958) (Tucker Act) and

1. The response of the Civil Service Commission stated that "separation of probationary employees is not subject to review by this office, and employees separated during probation are not entitled to a hearing." (R. 50)

2. The government stated in its brief in the Court of Appeals at p. 3: "[a]fter exhausting all administrative remedies (R. 41-50), plaintiff brought this action."

28 U.S.C. §1361 (1962). On May 30, 1972, after hearing cross motions for summary judgment, the district judge denied plaintiff's motion, granted the government's motion and dismissed plaintiff's complaint. (App. A-3) The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court on March 15, 1973. (App. A-1-2)

REASONS FOR GRANTING THE WRIT

Unprotected by the requirements of due process, an individual who stands charged by her government with immorality would have cause to envy any felon who stands accused of an infamous crime. For unlike the criminally accused, such an individual would be deprived of her good name without being "afforded a chance to defend herself. She may have been the victim of an official's caprice," *Wisconsin v. Constantineau*, 400 U.S. 436, 437 (1971), and yet she would be without recourse. For "[o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Ibid.*

This case unavoidably presents such an oppressive result. (This Court is asked to review a summary judgment in favor of the government and, consequently, the truth of petitioner's claim that she was innocent of the charges made against her must be assumed.) Margaret Jenkins' plight epitomizes the arbitrary aspect of governmental action unilluminated by the most rudimentary features of due process. Moreover, her petition raises fundamental questions concerning the scope of the Fifth Amendment's protection of liberty.

1. Good Name, Reputation, Honor and Integrity

This Court held in *Wisconsin v. Constantineau, supra,* that "[w]here a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and opportunity to be heard are essential." 400 U.S. at 437. This protection of a person's good name, as Mr. Justice Stewart explained in *Board of Regents v. Roth,* 408 U.S. 564 (1972), is part of the protection of liberty guaranteed by the due process clauses of the Fifth and Fourteenth Amendments.

In *Roth,* a case involving nonrenewal of the contract of a nontenured teacher, the Court found no deprivation of liberty where a public employer "did not make any charge against [the employee] that might seriously damage his standing and associations in the community." *Id. at* ..... However, the Court observed that had the nonrenewal been based "on a charge, for example, that [the employee] had been guilty of dishonesty or immorality . . . this would be a different case." *Ibid.*

Such a different case is presented by the instant petition. Margaret Jenkins' termination was based on a charge of immorality. Specifically, she was accused by the government of public profanity. Consequently, "notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau, supra. See Wieman v. Updegraff,* 344 U.S. 183, 191 (1952); *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U.S. 123 (1951); *United States v. Lovett,* 328 U.S. 303, 316-17 (1946); *Peters v. Hobby,* 349 U.S. 331, 352 (1955).

The Court of Appeals, in discussing the basis for petitioner's termination, adverted to a general description of

the charges against her, namely, "failure to meet minimum standard requirements," but did not discuss the implications of the specific charges made against petitioner. It acknowledged the mandate of *Wisconsin v. Constantineau, supra*, that there be a hearing "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him . . ." but found petitioner's reliance on that precedent inappropriate because "a posting procedure similar to that which concerned the Court in *Constantineau* is not at issue here. (*App. A-2*)

Wisconsin v. Constantineau involved a state law under which appellee, allegedly an excessive drinker, had been prohibited, without prior notice or opportunity for a hearing, from purchasing liquor. This Court affirmed a decision striking down the statute for its failure to afford procedural due process. Notice of the prohibition had been posted in liquor stores in the city in which appellee resided (although such posting was not specifically required by the statute).

While notice of Margaret Jenkins' termination was not exhibited in every Post Office in Seattle, the charges of immorality were made public through communications by the Post Office which had such an effect on petitioner's reputation as to make it impossible for her to obtain employment. (R. 13) The publication in petitioner's case was even more damaging than that in *Wisconsin v. Constantineau*.

2. Right To Engage in the Common Occupations

The liberty protected by the Fifth and Fourteenth Amendments encompasses also the right of an individual

to engage in any of the common occupations of life. *Board of Regents v. Roth, supra* at .....; *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). That right is curtailed where the government "impose[s] . . . a stigma or other disability that foreclose[s] one's freedom to take advantage of other employment opportunities." *Board of Regents v. Roth, supra.*[3]

In *Roth*, unlike the instant case, there was "no suggestion [in the record] of how nonretention might affect the respondent's future employment prospects." 408 U.S. at ....., n. 13. The Court concluded, "Mere proof . . . that his record of nonretention in one job, taken alone, might make [the employee] somewhat less attractive to some employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' *Cf. Schware v. Board of Examiners* [353 U.S. 232 (1957)]." *Ibid.* But the record on which the district court rendered summary judgment in this case showed that Margaret Jenkins had been unable, in light of the government's charges of immorality, to obtain regular employment, governmental or other, since January of 1970, a period of more than two years.[4] (R. 13)

CONCLUSION

The actions of the Post Office have destroyed petitioner's good name and undermined her ability to obtain employ-

3. While this issue was argued below (Brief of Appellant, pp. 9-10, Reply Brief of Appellant, pp. 3-4) the opinion of the Court of Appeals makes no reference to it.

4. In *Schware v. Board of Examiners, supra*, petitioner had been prevented from engaging in one profession (law) and this Court found a deprivation of liberty. Petitioner here has been effectively prevented from obtaining regular employment of any kind.

ment. In so doing they have diminished her liberty without due process of law. For these reasons, her petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARGARET JENKINS, *Plaintiff-Appellant,* vs. U.S. POST OFFICE; WINTON M. BLOUNT, as Post Master General of the United States; JAMES J. SYMBOL, as Post Master of Seattle; The United States Civil Service Commission; and NICHOLAS ORGANVIC, Commissioner of the Civil Service Commission; and UNITED STATES OF AMERICA, *Defendants-Appellees.*	No. 72-2287

[March 15, 1973]

Appeal from the United States District Court for the Western District of Washington

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Before: KOELSCH and WRIGHT, Circuit Judges, and BELLONI,* District Judge.

BELLONI, District Judge:

This is an appeal from an order granting summary judgment in favor of the United States.

Margaret Jenkins (plaintiff) was employed as a postal trainee by the United States Post Office. Her appointment was "career conditional" with a one year probationary period. Plaintiff's employment was terminated in the course of the probationary period because of her "failure to meet minimum standard requirements." Plaintiff was informed of her discharge by letter which additionally advised her that [t]here is no allowable appeal from this decision through the Post Office Department procedures."

Plaintiff maintains that she was entitled to a pre-dismissal hearing. Conceding that the right to a hearing is not

*Honorable Robert C. Belloni, United States District Judge, District of Oregon, sitting by designation.

authorized by any statute or regulation, plaintiff contends that such a hearing is required by the Fifth Amendment, and that her termination from government employment without a hearing constituted a deprivation of liberty and property without due process of law.

We find plaintiff's arguments unconvincing and affirm the decision of the district court.

Plaintiff suggests that the Constitution requires a hearing to protect an individual's liberty any time a government employee is discharged under circumstances which reflect unfavorably upon his character. This proposition is overly broad. "[A]ny reason [assigned for the dismissal] other than reduction in force is likely to be to some extent a reflection on a probationer's ability, temperament, or character." *Medoff v. Freeman*, 362 F.2d 472, 476 (1st Cir. 1966). Nonetheless, not every dismissal attains constitutional proportions. "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). However, a posting procedure similar to that which concerned the Court in *Constantineau* is not at issue here. Plaintiff's reliance on *Constantineau* is inappropriate.

Plaintiff did not have a property interest in her continued employment. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court, in *Roth*, further observed that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement of those benefits." *Roth* at 577. Plaintiff was a probationary employee and as such had no right to continued employment. Plaintiff's status did not give rise to a property interest entitling her to a pre-dismissal hearing.

Affirmed.

APPENDIX B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARGARET JENKINS, v. *Plaintiff,* UNITED STATES POST OFFICE, and others, *Defendants.*	CIVIL NO. 9131 JUDGMENT

THIS MATTER having come on regularly for hearing on May 4, 1972, on plaintiff's motion for summary judgment, and defendants' cross-motion for summary judgment, plaintiff appearing by Peter Greenfield, her attorney of record, and defendants appearing by Ernest Scott, Jr., Assistant United States Attorney for the Western District of Washington, and the Court having heard counsel, reviewed the files, exhibits and other documents filed herein, and being otherwise advised, it is hereby

ORDERED, ADJUDGED and DECREED that summary judgment is granted in favor of defendants, United States Post Office and others, including the United States, and against plaintiff, Margaret Jenkins. Plaintiff's Motion for Summary Judgment is denied, and her Complaint is dismissed.

DATED this 30th day of May, 1972.

Presented by:

/s/ WALTER T. McGOVERN
United States District Judge

/s/ ERNEST SCOTT, JR.
Assistant U.S. Attorney

Copy received, notice of presentation waived,

/s/ PETER GREENFIELD
Attorney for Plaintiff

APPENDIX C

Miss Margaret I. Jenkins
Prob. Sub. Clerk
515-28th Ave. E.
Seattle, Washington 98102

January 13, 1970

Dear Miss Jenkins:

This letter is official notice that you will be terminated from the Postal Service because of disqualification during probation effective at the close of business on Tuesday, January 13, 1970.

The reason for this action is your failure to meet the minimum standard requirements of a Substitute Distribution Clerk in that you have displayed conduct unbecoming a postal employee. On January 8, 1970, at Sears Roebuck & Co., you engaged in an argument with employees regarding their refusal to cash a personal check. In the presence of several of their employees and many of their customers, you used loud and profane language. This is in direct violation of Postal Manual, Conduct of Employees.

There is no allowable appeal from this decision through the Post Office Department procedures. Under certain circumstances, you have the right to appeal to the Regional Director, U.S. Civil Service Commission as shown below:

The only grounds upon which an appeal can be based are:

1. The action taken was based on political reasons not required by statute, or
2. The action resulted from discrimination because of sex, marital status, or from improper discrimination because of physical handicap.

If you file an appeal based on the above grounds, you should file an affidavit setting forth the facts and circumstances on which your appeal is based.

If an appeal is filed, it should be made to the Director, Seattle Region, U.S. Civil Service Commission, Federal Office Building, Seattle, Washington, 98104, and can be filed any time after receipt of this letter, but not later than fifteen (15) calendar days after the termination has been effected.

Sincerely yours,

/s/ James J. Symbol, *Postmaster*